IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1644

In the Matter of

The Claim for Benefits under Article 18 of the Labor Law made by BERTRAM M. DRASSENOWER, WILLIAM SLOMINSKY, WALTER EHRENPREIS, JOHN A. PODRASKY, LAWRENCE ALDOUS, MARIO L. ECHEMENDIA, ALFRED DOVE, ANGELO ENDRIZZI, ENOS E. FRANCIS, VINCENT HARRIGAN, CURTIS LEGRAND, STEPHEN ONDOCIN, LUCY MEAD, LOUIS V. LAURA, JOHN T. KEYS, FELIX A. SEDA, JOHN P. CESTOLA, JOSEPH A. POGGIOREALE, ANTHONY J. MARSELLA, EUGENE M. MCKENNA,
Petitioners,

v.

LOUIS L. LEVINE, as Industrial Commissioner,
Respondent.

APPENDICES TO PETITION FOR A WRIT OF CERTIORARI

ASHER B. LANS,
Attorney for Petitioners
555 Madison Avenue
New York, New York 10022

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Of Counsel

May 11, 1976

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Opinion and Order of the New York Court of Appeals Dismissing Appeal of Right, 38 N.Y.2d 771 (1975)

COURT OF APPEALS OF NEW YORK

December 2, 1975

Motion No. 913

In the Matter of

the Claim for Benefits &c. made by BERTRAM M. DRASSENOWER (Lead Case), *et al.*,

Appellants,

LOUIS L. LEVINE, as Industrial Commissioner,

Respondent.

Motion to dismiss the appeal granted and the appeal dismissed, without costs, upon the ground that no substantial constitutional question is directly involved.

Decision, Court of Appeals, Dec. 2, 1975

APPENDIX B

Order of the Court of Appeals Denying Motion for Leave to Appeal

COURT OF APPEALS OF NEW YORK

February 12, 1976

Motion No. 51

In the Matter of

the Claim for Benefits under Art. 18 of the Labor Law, made by BERTRAM M. DRASSENOWER (Lead case), *et al.*,

Appellants,

LOUIS L. LEVINE, as Industrial Commissioner,

Respondent.

Motion for leave to appeal denied.

Decision, Court of Appeals, Feb. 2, 1976

APPENDIX C

Order of the Supreme Court of the State of New York, Appellate Division, Third Judicial Department

At a Term of the Appellate Division of the Supreme Court in and for the Third Judicial Department, held at the Justice Building in the City of Albany, New York, commencing on the 14th day of April, 1975.

Present—Hon. LOUIS M. GREENBLATT, Justice Presiding
Hon. MICHAEL E. SWEENEY
Hon. T. PAUL KANE
Hon. ROBERT G. MAIN
Hon. JOHN L. LARKIN, Associate Justices

Index No. 25059

In the Matter of the Claim for Benefits under Article 18 of the Labor Law, made by BERTRAM DRASSENOWER (Lead Case) *et al.*,

Claimants-Appellants,

LOUIS L. LEVINE, as Industrial Commissioner,

Respondent.

Order of Affirmance

Claimants having appealed from a decision of the Unemployment Insurance Appeal Board, dated and filed in the Department of Labor, July 30, 1974, and said appeal having been argued by Robert Stephan Cohen, Esq., attorney for claimants-appellants, and by Irving Jorrisch, Assistant Attorney General, for the Respondent, during the above stated Term of this Court, and, after due deliberation, the Court having rendered a decision on the 12th day of June, 1975, it is hereby

Appendix C
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ORDERED that the said decision, so appealed from, be and the same hereby is affirmed, with costs.

Enter:

Dated and Entered: Jun 23, 1975

JOHN J. O'BRIEN
Clerk

A True Copy
s/ JOHN J. O'BRIEN
Clerk

APPENDIX D

Opinion of the Supreme Court of the State of New York, Appellate Division, Third Judicial Department, dated June 12, 1975, *sub nom. In the Matter of The Claim for Benefits under Article 18 of the Labor Law made by Bertram Drassenower (Lead Case), et al., Appellants. Louis L. Levine, as Industrial Commissioner, Respondent,* 48 App. Div. 2d 957, 369 N.Y.S.2d 227 (3rd Dept. 1975)

SUPREME COURT—APPELLATE DIVISION

THIRD JUDICIAL DEPARTMENT

June 12, 1975. 25059

In the Matter of the Claim of BERTRAM DRASSENOWER, (Lead Case) *et al.*,

Appellants.

LOUIS L. LEVINE, as Industrial Commissioner,

Respondent.

Appeal from a decision of the Unemployment Insurance Appeal Board, filed July 30, 1974, which affirmed a decision of a Referee sustaining initial determinations of the Industrial Commissioner that claimants' benefit rights were to be suspended for seven consecutive weeks.

Claimants are members of the International Association of Machinists, Local 1056, who were idled because of a strike against Trans World Airlines by its flight attendants represented by the Airline Stewards and Stewardesses Association of the Transport Workers Union of America. Although admittedly non-participants in the strike, claim-

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ants were nonetheless laid off when Trans World Airlines curtailed its operations as a result thereof, and since their loss of employment was thus triggered by an industrial controversy in the establishment in which they were employed, the board found subdivision (1) of section 592 of the Labor Law applicable to their situation and affirmed the seven weeks suspension of their benefit rights as expressly provided in that statute.

Seeking to overturn the board's decision on this appeal, claimants argue that subdivision (1) of section 592 of the Labor Law violates the due process and equal protection clauses of the Federal and State Constitutions, that it does not require the temporary suspension from benefits of nonparticipants as well as participants in an industrial controversy, and that, as interpreted by the board, it is void as contrary to public policy. We cannot agree.

With regard to the constitutionality of the statute in question, both subdivision (1) of section 592 of the Labor Law and a similar earlier statute, former section 504 of the Labor Law, have been the subject of repeated constitutional attacks over a period of many years. That these attacks have proved unavailing (*Matter of George* [*Catherwood*], 14 N.Y. 2d 234; *Chamberlin, Inc.* v. *Andrews,* 271 N.Y. 1, affd. 299 U.S. 515; *Matter of Kelly* [*Catherwood*], 33 A.D. 2d 830, affd. 29 N.Y. 2d 877), is testimony to the soundness of the statutory provision challenged herein and strongly supportive of its continued existence. Moreover, we have seen no evidence of recent developments which would suggest the need for a change in the State's long established policy of standing aside for a time from labor disputes "to avoid the imputation that a strike may be financed through unemployment insurance benefits" (*Matter of Burger* [*Corsi*], 277 App. Div. 234, 236, affd. 303 N.Y. 654), and it is our opinion that to require employers to subsidize wages lost by those on strike or locked out "would subvert the delicate balance of power existing between labor and management upon which the collective bargaining process depends" (*Matter of Kelly, supra,* p. 831).

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Claimants' remaining contentions are likewise without merit. It is well settled law that both strikers and nonparticipating employees within a struck establishment are subject to a suspension from unemployment insurance benefits (*Matter of George, supra; Matter of Ferrara* [*Catherwood*], 10 N.Y. 2d 1). As to the public policy of this State, it is determined by the Legislature and was determined in 1935 by the enactment of the statute in question here, which remains the public policy of this State until such time as the Legislature sees the need for a change (*Farrington* v. *Pinckney,* 1 N.Y. 2d 74).

Decision affirmed, with costs.

GREENBLOTT, J. P., SWEENEY, KANE, MAIN and LARKIN, J. J., concur.

APPENDIX E

Opinion and Decision of Unemployment Insurance Appeal Board, New York State Department of Labor, dated July 30, 1974

DECISION

New York State Department of Labor
Unemployment Insurance Appeal Board

Re: *Names*	*S.S.A. Nos.*	*Referee Case Nos.*	*Appeal Board Case Nos.*
Bertram M. Drassenower	126-30-3315	73-51283	193,453
Harry C. Rudolph	078-16-8051	73-51152	193,631
William Slominsky	078-18-3676	73-51282	193,632
Walter Ehrenpreis	110-24-3928	73-51284	193,633
John A. Podrasky	082-07-3568	73-51787	193,634
Lawrence Aldous	053-12-4508	73-51788	193,635
Mario L. Echemendia	262-70-9062	73-51789	193,636
Alred Dove	099-24-3181	73-51790	193,637
Angelo Endrizzi	053-34-3998	73-51791	193,638
Enos E. Francis	092-40-0540	73-51792	193,639
Vincent Harrigan	095-12-2761	73-51793	193,640
Curtis Legrand	233-16-2225	73-51794	193,641
Stephen Ondocin	055-01-4837	73-51795	193,642
Lucy Mead	118-24-2504	73-51796	193,643
Louis V. Laura	122-32-2470	73-51797	193,644
John T. Keys	160-24-0953	73-51798	193,645
Felix A. Seda	084-32-1649	73-51897	193,646
John P. Cestola	071-12-0621	73-52059	193,647
Joseph A. Poggioreale	130-26-3810	73-52060	193,648
Anthony J. Marsella	059-30-3065	73-52061	193,649
Eugene M. McKenna	100-20-1939	73-52062	193,650
Harry C. Rudolph	078-16-8051	73-52063	193,651

Decision mailed and duly filed in the Department of Labor on July 30, 1974.

The claimants appeal from the decision of the referee filed February 25, 1974 sustaining the revised initial determinations of the respective local offices suspending the accumulation of benefit rights by the claimants during a period of seven consecutive weeks effective November 6

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Opinion and Decision of Unemployment Insurance Appeal Board, New York State Department of Labor, dated July 30, 1974

through December 18, 1973 on the ground that each claimant lost his employment because of an industrial controversy in the establishment in which he was employed.

Combined hearings were held before the referee at which all parties were accorded a full opportunity to be heard and at which claimants, their attorneys and their union representatives, a representative of and a witness for the employer, and representatives of the Industrial Commissioner appeared and testimony was taken.

Prior to the hearings it was stipulated by and between all parties that the cases herein were test cases and that the decision of the referee herein will bind all other employees who are members of the International Association of Machinists whose work pattern is identical to these test cases; preserving, however, the individual right of appeal of any claimant and of the employer.

After a review of the record including testimony and evidence adduced before the referee and due deliberation having been had thereon, and having found that the referee's findings of fact and opinion are fully supported by the record, and that no errors of fact or law appear to have been made, the Board adopts the findings of fact and the opinion of the referee as the findings of fact and the opinion of the Board; except that we find that the referee inadvertently stated that Patrick Sayers was a claimant in these proceedings, whereas Mr. Sayers appeared as a witness for the employer.

DECISION: The decision of the referee is affirmed.

HARRY ZANKEL,
Member

ISIDORE SCHECHTER,
Member

APPENDIX F

Findings of Fact, Opinion and Decision of Unemployment Insurance Referee, New York State Department of Labor, dated February 25, 1974

New York State Department Of Labor
Unemployment Insurance Referee Section

Names	*Nos.*	Decision *Case Nos.*
Bertram M. Drassenower (Lead Case)	126-30-3315	73 51283
Harry Rudolph	078-16-8051	73 51152
William Slominsky	078-18-3676	73 51282
Walter Ehrenpreis	110-24-3928	73 51284
John A. Podrasky	082-07-3568	73 51787
Lawrence Aldous	053-12-4508	73 51788
Mario L. Echemendia	262-70-9062	73 51789
Alfred Dove	099-24-3181	73 51790
Angelo Endrizzi	053-34-3998	73 51791
Enos E. Francis	092-40-0540	73 51792
Vincent Harrigan	095-12-2761	73 51793
Curtis Legrand	233-16-2225	73 51794
Stephen Ondocin	055-01-4837	73 51795
Lucy Mead	118-24-2504	73 51796
Louis J. Laura	122-32-2470	73 51797
John T. Keys	160-24-0953	73 51798
Felix A. Seda	084-32-1649	73 51897
John P. Cestola	071-12-0621	73 52059
Joseph A. Poggioreale	130-26-3810	73 52060
Anthony J. Marsella	059-30-3065	73 52061
Eugene M. McKenna	100-20-1939	73 52062
Harry C. Rudolph	078-16-8051	73 52063

Decision mailed and duly filed in the Department of Labor on Feb. 25, 1974.

FINDINGS OF FACT: Combined hearings were held at which claimants, their representatives, representatives and witnesses for the employer and representatives of the

Appendix F
Findings of Fact, Opinion and Decision of Unemployment Insurance Referee, New York State Department of Labor, dated February 25, 1974

Industrial Commissioner appeared. Testimony was taken.

By revised initial determinations effective November 6 through December 18, 1973, claimants' benefit rights were suspended, on the ground that they each lost their employment as the result of a strike, lockout or other industrial controversy at the establishments at which they were employed. By additional initial determination effective November 5 through November 18, claimant H. Rudolph, was ruled ineligible for benefits because of failure to comply with registration requirements.

By stipulation of the parties, the cases herein were designated as test cases for all other claimants having identical work patterns, preserving, however, the individual rights of appeal of any such claimant as well as of the employer.

Claimants, members of the International Association of Machinists, all worked for the employer herein in different job classifications at either Kennedy or La Guardia airports for varying periods of time prior to a strike by the employer's union cabin attendants which occurred on November 5. As a result of the strike, the employer's operations were curtailed and claimants laid-off. The strike ended December 18.

At Kennedy Airport, the striking cabin attendants regularly reported to and were directed and controlled from a single, large three-story structure maintained there by the employer and known as hanger "12". It was on the third floor of that structure that they signed in and out, received pre-flight instructions, took care of their personal pre-flight needs, awaited their actual departure times and spent any "layover" time when such occasions arose. In addition to

flight operations offices and employee lounges, the employer also maintained various administrative, payroll and other offices on the third floor of the structure, including some space specifically set aside for use by a grievance committee representing members of the union involved herein. The employer maintained a company cafeteria along with employee locker facilities on the second floor while the lower level consisted largely of a series of mechanical, electrical and various other shops. The three levels as aforedescribed comprised the central portion of the full structure. Extending to either side of this central portion, but all still under the same roof, and, with but one exception to be noted later, all forming part of the structure as originally constructed, were two large, high hangers or garage areas used for housing aircraft. An additional still higher area was added a few years back to accommodate the much larger air planes which are currently in use.

Returning to the third floor, that area also included a teletype office manned by members of the International Association of Machinists as well as training facilities for other employees [sic] members of the same union. The employer also maintained medical facilities for all other company employees on that floor. Outside of, and directly adjacent to the hanger space, extending for several hundred feet and separated from the surrounding airfield and from other nearby structures by thick, concrete "blast fences", were the so-called "Line" areas. These were, in effect, open extensions of the hanger areas where additional aircraft could be brought for servicing and maintenance. The surrounding "blast fences" had open areas to aircraft to be taken from the airport proper to the "line" and to allow for necessary machinery and equipment to be brought from a

nearby company garage. Those claimants herein who worked primarily on the "line" areas reported for their assignments at hanger 12 each day along with all other claimants whose work was primarily performed at the shops or the hanger space within the structure itself.

Company personnel who reported for work at hanger "12", including the striking flight personnel as well as the non-striking claimants herein, all were required to use the very same entrance to the structure, passing the same security guards at a company parking lot located in front of the building, as well as a further security post on the ground floor directly inside the structure itself. The parking lot was completely fenced off from the public thoroughfares and from other areas and represented the only reasonably direct approach to the structure.

At La Guardia Airport, the striking cabin attendants reported for their assignments at the general passenger terminal building used jointly by all the various airlines operating at that airport. They did so at particular set areas of the terminal assigned to this specific use of the employer herein. Since the employer's administrative, personnel and payroll facilities were centrally located at hanger 12 at Kennedy Airport, flight personnel assigned to La Guardia were required to report in via a tele-audograph system connecting the two locations. The employer, however, maintained briefing and lounge areas as well as grooming facilities for its flight personnel at La Guardia.

Claimant, Patrick Sayers, a ramp chief, was the only claimant herein who was assigned to La Guardia at the time of the strike. He and other personnel assigned there reported for work in the same manner and in the same general area as did the cabin attendants. In addition, they

Appendix F
Findings of Fact, Opinion and Decision of Unemployment Insurance Referee, New York State Department of Labor, dated February 25, 1974

kept their personal belongings and received their pay at the passenger terminal there.

Claimant, H. Rudolph, did not file his original claim for benefits until November 19 for reasons best known and understood to himself. He was not advised by any employee of the Division of Employment not to file for benefits sooner.

OPINION: Section 592 of the Unemployment Insurance Law provides, in substance, for the suspension of a claimant's benefit rights where he or she loses employment because of a strike, lockout or other industrial controversy in the *establishment* in which he or she was *employed.*

In this case, the Industrial Commissioner determined that the striking cabin attendants [sic] "establishment", for purposes of Section 592, was hanger 12 at Kennedy Airport and the passenger terminal at La Guardia Airport. This was predicated on a finding that these sites constituted their "base of operations" at each of the respective airports. In this regard, the Industrial Commissioner's contention was squarely in line with previous Appeal Board and court rulings in similar circumstances. *Matter of Ferrara,* 10 N.Y.2d 1, aff'g 11 App. Div. 2d 177 as cited in A.B. 102,938 et-al; 173,518 A et-al; modifying AB 168,160 et-al. See also AB 155,452, distinguishing *Matter of Sierant,* 24 N.Y.2d 675, revg. 27 App. Div. 2d 403. In AB 155,452, the claimants involved worked in a single structure, albeit a rather large one encompassing a wide variety of divergent activities and operations. The Board there held that all the employees, strikers as well as non-strikers, were employed in a single establishment. Nothing in the record before me warrants a more narrow definition of the term "establishment" as urged by claimants' representatives or any departure from the position taken by the Industrial Commissioner.

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Findings of Fact, Opinion and Decision of Unemployment Insurance Referee, New York State Department of Labor, dated February 25, 1974

There remains then only the question of determining whether claimants herein, or any of them, were employed at the struck "establishments" so as to warrant suspension of their benefit rights as provided by Section 592. The Industrial Commissioner's affirmative rulings in this regard were likewise predicated on the finding that each claimant had, as his or her "base of operations", either hanger 12 at Kennedy Airport or the passenger terminal at La Guardia Airport. Again, the evidence established that each claimant reported to work there and received, if not direct, at least general supervision, direction and control from the two structures involved. In line with the Court and Appeal Board rulings referred to above, it is concluded again that the position of the Industrial Commissioner in this regard must be sustained.

That claimants all lost their employment as the result of the strike by the cabin attendants was undisputed. Under the circumstances, it is therefore concluded the suspensions imposed were warranted in all cases.

It becomes unnecessary for the Referee to rule on the additional initial determination of failure to comply with registration requirements as respects claimant H. Rudolph. Challenges to the constitutionality of Section 592 as raised by claimant's representatives, are, of course beyond the Referee's scope of authority.

DECISION: The revised initial determinations suspending claimants' benefit rights because of loss of employment due to industrial controversy, are sustained.

/s/ DAVID WEISENBERG
Referee

APPENDIX G

Unreported Opinion and Order of Three-Judge Court in the United States District Court for the Northern District of Ohio, dated March 4, 1976, in *Hodory* v. *Ohio Bureau of Employment Services, et al.* (No. C75-15X)

UNITED STATES DISTRICT COURT
Northern District of Ohio
Eastern Division

No. C75-15X

LEONARD PAUL HODORY,

Plaintiff

v.

OHIO BUREAU OF EMPLOYMENT SERVICES, *et al.*,

Defendants

CELEBREZZE, Circuit Judge, LAMBROS, District Judge
KRUPANSKY, District Judge.

Memorandum Opinion and Order

Plaintiff, Leonard Paul Hodory (Hodory) filed the above-captioned action, pursuant to 42 U.S.C. §1983, on behalf of himself and all other persons similarly situated whose claims for unemployment benefits were denied or will be denied because of the operative effective of a labor dispute disqualification provision in §4141.29(D)(1)(a) of the Ohio Revised Code.

Hodory challenged the constitutionality of §4141.29(D)(1)(a) on the grounds that: the provision is in conflict with §303(a)(1) of the Federal Social Security Act, 42 U.S.C. §503(a)(1) and violates the Supremacy Clause to the United States Constitution; the labor dispute disqualification contained therein denies plaintiff and the class he seeks to represent the right to equal protection of the laws, guaranteed under the 14th Amendment to the United States Constitution; and the overboard disqualification provision bears no real and substantial relation to the legislative purpose and constitutes a denial of due process of law guaranteed by the 14th Amendment to the United States Constitution.

Hodory requested the issuance of permanent injunctive relief to restrain the Ohio Bureau of Employment Services (Employment Bureau) and the Administrator, Albert E. Giles, from enforcing §4141.29(D)(1)(a) and a declaration that the statute is unconstitutional. In addition, plaintiff sought past unemployment benefits for himself and the class he purports to represent which he alleged were denied by virtue of the application of that statutory provision.

This matter came on for hearing before this three-judge Court on October 23, 1975. The following are the Court's findings of fact and conclusions of law.

I. FINDINGS OF FACT

The operative facts as set forth herein were not disputed by the parties.

Hodory was laid off from his job as a Millwright apprentice with the United States Steel Corporation (U.S. Steel), Ohio Works, in Youngstown, Ohio on November 12, 1974. He applied for unemployment benefits on November 13, 1974 and was subsequently notified by the Ohio Bureau of

Employment Services (Employment Bureau) that his claim was disallowed, pursuant to §4141.29(D)(1)(a) O.R.C.

Section 4141.29(D)(1)(a) provides, in pertinent part:

> (D) Notwithstanding division (A) of this section, no individual may serve a waiting period or be paid benefits under the following conditions:
>
> (1) for any week with respect to which the administrator finds that:
>
> (a) *His unemployment was due to a labor dispute* other than a lockout *at any factory, establishment, or other premises* located in this or any other state and *owned or operated by the employer by which he is or was last employed; and for so long as his unemployment is due to such labor dispute* . . . (Emphasis added.)

It is clear that Hodory became unemployed through no fault of his own. He was one of approximately 1250 United Steelworkers who was laid off by either U.S. Steel or Republic Steel Corporation at their plants in Ohio because of a nationwide strike by the United Mine Workers at coal mines owned and operated by these two steel companies. The steelworkers were in no way involved in the disqualifying labor dispute between the coal miners and the steel companies nor did they benefit from that dispute.

Hodory was denied unemployment benefits from November of 1974 through January 11, 1975, at which time the coal miners' strike was apparently terminated. The Employment Bureau's sole basis for denying Hodory's application for weekly benefits during this period was that such benefits were barred under the labor dispute disqualification found in § 4141.29(D)(1)(a) O.R.C.

Hodory has taken an administrative appeal from the decision of the Employment Bureau, which appeal is still pending. It is being considered along with the appeals of the approximately 1250 other claimants similarly situated as a "group appeal" by the administrative Board of Review.

Hodory resumed his employment on March 30, 1975 and is presently employed.

During the pendency of this lawsuit § 4141.29(D)(1)(a) O.R.C. was amended to provide, in pertinent part, that:

> . . . No individual shall be disqualified under this provision if: (i) HIS EMPLOYMENT WAS WITH SUCH EMPLOYER AT ANY FACTORY, ESTABLISHMENT, OR PREMISES LOCATED IN THIS STATE, OWNED OR OPERATED BY SUCH EMPLOYER, OTHER THAN THE FACTORY, ESTABLISHMENT, OR PREMISES AT WHICH THE LABOR DISPUTE EXISTS, IF IT IS SHOWN THAT HE IS NOT FINANCING, PARTICIPATING IN, OR DIRECTLY INTERESTED IN SUCH LABOR DISPUTE . . .

This amendment, Am. Sub. Senate Bill 173, however did not become effective until December 2, 1975, and is not to be retroactively applied.

II. Conclusions of Law

A. *Availability of Relief in this Court*

The first issue for this Court to consider is whether, in light of the pendency of the appellate administrative pro-

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Unreported Opinion and Order of Three-Judge Court in the United States District Court for the Northern District of Ohio, Dated March 4, 1976 in Hodory v. *Ohio Bureau of Employment Services, et al. (No. C75-15X)*

ceedings, this Court is precluded from adjudicating plaintiff's claims and from issuing injunctive relief against the defendants should the Court conclude that plaintiff is entitled to such relief on the merits of his claims.

Initially, it should be noted that there is no absolute bar in this case against the issuance of injunctive relief under the provisions of 28 U.S.C. § 2283, the Anti-injunction statute. *Mitchum* v. *Foster,* 407 U.S. 225 (1972); *Gibson* v. *Berryhill,* 411 U.S. 564 (1973). The Court must, nevertheless, consider the possible applicability of certain established principles of equity, comity, and federalism which would require this Court to refrain from determining the claims for injunctive relief.

The Supreme Court has recently articulated those circumstances in which such principles may suggest that a federal court refrain from exercising jurisdiction or abstain from determining claims for injunctive relief: 1) where a party has failed to exhaust available administrative remedies; 2) where a party seeks to enjoin a pending state criminal prosecution in the absence of special circumstances as set forth in *Younger* v. *Harris,* 401 U.S. 37 (1971); or where abstention and a stay in federal court is indicated to afford the state courts an opportunity to determine unsettled questions of state law prior to federal court intervention on the federal constitutional questions. *Gibson* v. *Beryhill, supra,* 411 U.S. at 573-574.

Upon due consideration, the Court concludes that the circumstances of the present case do not present a situation where dismissal or abstention would be appropriate. While clearly the plaintiff herein has not exhausted the administrative remedies which are available under Ohio law, in *Gibson,* the Supreme Court stated specifically that administrative remedies need not be exhausted where the federal court plaintiff states a good cause of action under 42 U.S.C. § 1983. Moreover, in the instant action, exhaustion of the available administrative remedies would in all probability prove a futile effort to vindicate plaintiff's constitutional claims in ths case. Secton 4141.29(D)(1)(a), on its face, would appear to except the plaintiff from unemployment benefits for the period he was laid off due to coal miners' strike. In addition, the Employment Bureau has denied benefits to plaintiff, as well as the 1250 United Steelworkers, who were similarly effected [sic] by the coal miners' strike, solely on the basis of the challenged labor dispute disqualification.

It was established at the hearing that the administrative appeal process does not permit the plaintiff to challenge the constitutionality of § 4141.29(D)(1)(a). The agency is bound by the prior Ohio court determinations as to the effect of that provision, and the Ohio courts have held the disqualification provision to be constitutional.[1] The plain-

1. In an unpublished decision, the Court of Appeals of Montgomery County, Ohio, upheld the constitutionality of the provision. *Barnes* v. *Board of Review,* Case No. 3948, (1972). Moreover, the defendants cited to several Ohio Supreme Court cases in their brief and during oral argument in support of their position that § 4141.29 (D)(1)(a) does not create an unconstitutional classification in viola-

tiff's failure to exhaust his administrative remedies therefore does not require a dismissal of his claims.

With regard to the Supreme Court's pronouncement in *Younger* v. *Harris, supra,* and the Court's subsequent decision in *Huffman* v. *Pursue,* 420 U.S. 592 (1975), the Court finds that the principles set forth in those cases do not necessitate that this Court exercise restraint in determining the issues raised herein or from issuing injunctive relief, should plaintiff be entitled to the same. While the *Huffman* decision broadens the judicially-created *Younger* doctrine to include a prohibition against federal court interference with certain ongoing *civil* proceedings in the state courts, the Supreme Court in *Huffman* made it clear that its holding was limited to the enjoining of ongoing state-initiated *judicial* proceedings and that such prohibition did not extend to an action brought under 42 U.S.C. § 1983 in which a party was challenging state administrative action in federal court. *Supra,* n. 21.

Finally, this Court concludes that abstention would not be proper in this case. Section 4141.29(D)(1)(a) is not an ambiguous statute involving unsettled questions of state law which could be rendered constitutionally inoffensive by

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tion of the Equal Protection clause of the 14th Amendment. *Cornell* v. *Bailey,* 163 Ohio St. 50 (1955); *Continental Can Company, Inc.* v. *Donahue,* 5 Ohio St. 2nd 224 (1966). In *Cornell* v. *Bailey,* the Supreme Court noted that it was the positive intent of the Ohio General Assembly to exclude those individuals who were involuntarily unemployed as well as those voluntarily unemployed as a result of a labor dispute from benefits. The Supreme Court concluded that such determination was a legislative function and that the only relief available to an involuntarily unemployed claimant was to seek a legislative amendment to the statute.

a limiting construction in the state courts. *Daniels* v. *Waters,* F.2d (6th Cir. 1975). It has been held that "[A]bstention should not be applied merely to await an attempt to vindicate a claim of the appellant in state court." *Gay* v. *Board of Registration Commissioners,* 466 F.2d 879, 885 (6th Cir. 1972). In the instant case, plaintiff has not yet even reached the first level of judicial review and under §4141.28 of the Ohio Revised Code, he is required to undertake three administrative appeals before he will be entitled to file his challenge in the state courts, where, moreover, the issue as to the constitutionality of the labor dispute disqualification has apparently been settled.

Accordingly, for the reasons set forth above, the Court concludes that the principles of comity, equity, and federalism do not require that this Court dismiss the instant suit or abstain from deciding the claims presented herein until such time as the state courts may have an opportunity to adjudicate the same or from issuing whatever relief may be appropriate upon its determination.

B. *Class Certification*

Plantiff, in his complaint, defined the class he purports to represent herein as all persons whose claims for unemployment benefits have been or will be denied because of the operative effect of § 4141.29(D)(1)(a). While the Court does find that class certification of the claims for injunctive and declaratory relief and past benefits is appropriate, the class as defined by plaintiff in his complaint is

over broad in light of the nature of plaintiff's claims and the requirements of Rule 23 of the Federal Rules of Civil Procedure.

The plaintiff's factual allegations and the undisputed evidence presented herein established that Hodory and approximately 1250 members of the United Steelworkers in Ohio, who became unemployed through no fault of their own, were denied unemployment benefits by defendants for a specific period of time because of the labor dispute disqualification clause in § 4141.29(D)(1)(a), despite the fact that they may have been qualified in all other respects to receive the benefits.[2] With regard to this particular group of individuals, the Court finds that the prerequisites to certification of this action as a class action under Rule 23(a) have been met, and that the class action is maintainable under the provisions of Rule 23(b)(2).[3] In light of the fact that the class is certified as a Rule 23(b)(2) class and the nature of the relief sought, the Court concludes

2. At the hearing, plaintiff stated that the claims of some 6,100 Autoworkers in Youngstown, Ohio have been denied by defendants on the sole basis of the challenged disqualification provision. However, no further factual support was offered in this regard from which this Court can conclude that plaintiff's representation of these individuals in this suit would be proper under Rule 23.

3. The fact that plaintiff seeks the award of past unemployment benefits does not effect [sic] the certification of this class as a rule 23(b)(2) class. The monetary relief is essentially in the nature of equitable relief rather than damages, and there is authority to support the maintainability of the class under 23(b)(2) in such circumstances. *Bermudez* v. *U.S. Department of Agriculture,* 490 F.2d 718 (D.C. Cir. 1973); *see also, Pettway* v. *American Cast Iron Pipe Co.,* 494 F.2d 211 (5th Cir. 1974); 3B Moore's Federal Practice ¶ 23.40.

that notice prior to the determination of the claims herein is not required.

C. *Constitutional Validity of § 4141.29(D)(1)(a)*

Plaintiff has challenged the constitutionality of § 4141.29 (D)(1)(a) on several grounds. For the reasons set forth below, this Court concludes that the operative effect of that labor dispute disqualification provision violates the rights of plaintiff and the class he represents to equal protection and due process of law as guaranteed under the 14th Amendment to the United States Constitution and 42 U.S.C. § 1983.

Chapter 4141 of the Ohio Revised Code, which was enacted by the Ohio Legislature pursuant to the Federal Social Security Act, provides generally for the payment of benefits to unemployed individuals. In § 4141.29 it is indicated that the overall purpose of the legislation is to provide benefits as compensation for loss of remuneration due to *involuntary* total or partial unemployment. That provision contains a number of clauses which disqualify certain classes of unemployed individuals from receiving such benefits. In accordance with the apparent purpose of the enactment each of these classes, except one, disqualify only those individuals who become unemployed through some fault of their own.[4] Thus the provisions of § 4141.29(d)(1) reflect that an individual may not receive benefits if that person has been laid off for disciplinary reasons; or if the person quit work without just cause; or if the individual quit work

4. The statute was previously held constitutional in the case of *Lasko* v. *Garnes,* No. C 72-1350 (N.D. Ohio, decided August 14, 1973), wherein the disallowance of benefits because of pregnancy, was the basis of the challenge.

to become married or because of marital, parental, filial or other domestic obligations, or became unemployed because of pregnancy; or if the person has made false statements in an attempt to obtain benefits; or if the person was discharged for dishonesty in connection with his most recent employment; or if the person has become unemployed as the result of a labor dispute. Therefore, the only class of unemployed individuals who are presently ineligible for benefits as a result of their having become unemployed involuntarily are those persons who fall within the labor dispute disqualification found in § 4141.29(D)(1)(a).[5]

A state legislature may create a classification which discriminates against certain individuals without violating the Equal Protection clause in the 14th Amendment, if that classification furthers a suitable governmental interest. *Police Department of Chicago* v. *Mosley*, 408 U.S. 92 (1972).

In the instant action, the defendants argued in their brief that the legitimate reasons for the enactment of § 4141.29 (D)(1)(a) were that:

> 1. Granting of benefits to workers laid off due to a strike in a parent company's subsidiary plant would in effect be subsidizing the union members;
>
> 2. Granting of benefits would place the employer at an unfair disadvantage in negotiations with the

5. Of course, as of December 2, 1975 defendants will not be permitted to deny benefits to one unemployed due to a labor dispute unless an element of fault—"financing, participating in, or directly interested in"—is demonstrated. However, the amendment does not moot the issues raised herein, since, as noted previously, it is not to be applied retroactively and will not effect [sic] the status of plaintiff and the class for the period during which they were denied benefits pursuant to § 4141.29(D)(1)(a).

> unions. If the financial burden of supporting its striking union members is shifted from the unions' treasury to the State of Ohio, it's conceivable that no concerted effort to negotiate a fair settlement would be pursued until the employer reached a financial crisis, thereby yielding to unreasonable and economically unsound union demands to prevent bankruptcy;
>
> 3. The State has a legitimate purpose in protecting the fiscal integrity of its compensation fund. Strikes involving large corporations such as U. S. Steel, Republic Steel . . . and other corporate giants involve many hundreds of employees, even thousands. Benefits paid to workers resulting from labor strikes lasting for many weeks or months would deplete the unemployment fund.

The Court concludes that defendants have failed to advance reasons which would establish that the State of Ohio had a legitimate purpose for discriminating against the instant class in the payment of unemployment benefits. Each reason advanced contemplates that a union member, who is unemployed by virtue of a labor dispute between his employer and another union, has some control over, is at fault, or stands to benefit from that labor dispute. In fact, the evidence presented herein established that plaintiff and the class he represents were merely victims of the coal miners' strike, as is the case with any individual who has become unemployed because of adverse circumstances or conditions which may effect [sic] his employer's financial ability to continue to employ him. The fact that the plain-

tiff and the 1250 class members also happen to be union members (of a different union) is certainly no legitimate reason, standing alone, to deny them benefits. Moreover, close scrutiny of the reasons for the State's classification reveals that what the state is actually intending to prevent is not the "subsidizing" of unemployed *union members, per se,* but the subsidizing of union-initiated work stoppages.

Certainly the three purposes offered by defendants would be legitimate reasons for the State's denial of benefits to unemployed members of a union which is involved in a labor dispute. However, the denial of benefits to plaintiff and the class herein in no way served the State's interest in seeking to avoid the subsidization of the coal miners' strike. Nor is it logical to conclude that payments of unemployment benefits to the *Steelworkers* would have placed U. S. Steel or Republic Steel at an unfair disadvantage in negotiations with the *coal miners' union.* Payments of funds to the steelworkers could hardly be deemed to put the coal miners in a position to refuse to negotiate with the steel companies until the companies reached a financial crisis, thereby causing the companies to yield to the unreasonable and economically unsound demands of the coal miners to prevent bankruptcy.

The Court finds, therefore, that the defendants have failed to demonstrate that the classification imposed by § 4141.29(D)(1)(a) is justified by a legitimate state interest under the circumstances of this case, and, accordingly, the Court concludes that the application of the labor dispute disqualification to deny benefits to plaintiff and the class certified herein is violative of the Equal Protection

clause of the 14th Amendment and plaintiffs' rights as guaranteed by 42 U.S.C. § 1983.

Similarly, the Court finds that the defendants have failed to demonstrate that the application of § 4141.29(D)(1)(a) with respect to plaintiff and the class bears a real and substantial relation to a legitimate state purpose and, therefore, the statutory provision as applied in this case to deny individuals who were unemployed through no fault of their own and neither participated in nor benefited from the labor dispute involving another union and their employer, also violates plaintiffs' right to due process of law guaranted by the 14th Amendment and 42 U.S.C. § 1983.

Since the Court has declared the application of § 4141.29 (D)(1)(a) to be constitutionally invalid as to plaintiff and the class members on equal protection and due process grounds, the Court need not reach the other issues raised by plaintiff in his complaint.

D. *Relief*

The Court finds that plaintiff and the members of the class of steelworkers, who were laid off for a specific period of time because of the labor dispute between their employer and the United Mine Workers and who, but for the labor dispute disqualification provision, § 4141.29(D)(1)(a), would have been entitled to collect unemployment benefits, are entitled to equitable relief in this case. Accordingly, the defendants, their agents and employees are enjoined from continuing to enforce § 4141.29(D)(1)(a) of the Ohio Revised Code so as to deny the unemployment

Appendix G
Unreported Opinion and Order of Three-Judge Court in the United States District Court for the Northern District of Ohio, Dated March 4, 1976 in Hodory v. *Ohio Bureau of Employment Services, et al. (No. C75-15X)*

benefits to plaintiff and the class members which they are entitled to receive. In this regard, the defendants shall pay those past unemployment benefits which would have been provided to each otherwise qualified claimant within this class to whom such benefits were denied on the sole basis of § 4141.29(D)(1)(a).

This case is hereby terminated.

IT IS SO ORDERED.

/s/ ANTHONY J. CELEBREZZE
Anthony J. Celebrezze
Circuit Judge

/s/ THOMAS D. LAMBROS
Thomas D. Lambros
District Judge

/s/ ROBERT B. KRUPANSKY
Robert B. Krupansky
District Judge

Dated: March 4, 1976

Appendix G
Judgment

UNITED STATES DISTRICT COURT
Northern District of Ohio
Eastern Division

No. C 75-15 Y

LEONARD PAUL HODORY,
Plaintiff,

v.

OHIO BUREAU OF EMPLOYMENT SERVICES, *et al.,*
Defendants.

CELEBREZZE, Circuit Judge, LAMBROS, District Judge, KRUPANSKY, District Judge.

Judgment

In accordance with the accompanying Memorandum Opinion and Order, the defendants are enjoined from continuing to enforce Ohio Revised Code § 4141.29(D)(1)(a) so as to deny the plaintiff and the class members the unemployment benefits to which they are otherwise entitled, and defendants are further ordered to pay past unemployment benefits which were denied plaintiff and members of the class solely on the basis of § 4141.29(D)(1)(a). Plaintiffs shall recover their costs of suit.

IT IS SO ORDERED.

ANTHONY J. CELEBREZZE
Circuit Judge

THOMAS D. LAMBROS
District Judge

ROBERT B. KRUPANSKY
District Judge

Dated: March 4, 1976

APPENDIX H

Notice of Appeal and Related Papers Filed by the Ohio Attorney General in *Hodory* v. *Ohio Bureau of Employment Services, et al.*

UNITED STATES DISTRICT COURT
For The Northern District of Ohio
Civil Action No. C75-15-Y

LEONARD PAUL HODORY,
Plaintiff,

vs.

OHIO BUREAU OF EMPLOYMENT SERVICES
and
ALBERT G. GILES,
Defendants.

Notice of Appeal to the Supreme Court of the United States

Notice is hereby given that the Ohio Bureau of Employment Services, Albert G. Giles, Administrator, defendants above named, hereby appeal to the Supreme Court of the United States from the final order and judgment of the United States District Court, Northern District of Ohio, Eastern Division entered in this action on March 4, 1976 and filed on March 5, 1976.

This appeal is taken pursuant to 28 U.S.C. Section 1253.

WILLIAM J. BROWN
Attorney General

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Ohio Bureau of Employment Services
145 South Front Street
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614/466-2707

Appendix H
Notice of Appeal and Related Papers Filed by the Ohio Attorney General in Hodory v. Ohio Bureau of Employment Services, et al.

UNITED STATES DISTRICT COURT
For The Northern District of Ohio
Eastern Division
Civil Action No. C75-15-Y

LEONARD PAUL HODORY,
Plaintiff

vs.

OHIO BUREAU OF EMPLOYMENT SERVICES
and
ALBERT G. GILES,
Defendants

Motion to Certify the Record and Transmit to the United States Supreme Court

The defendants, Ohio Bureau of Employment Services and Albert G. Giles, intend to file in the Supreme Court of the United States a Notice of Appeal for a review of the order and judgment entered in the above-entitled proceeding.

The defendants accordingly request that you prepare and certify, for transmission to the Clerk of the Supreme Court of the United States, a copy of the entire record that was before this court in the above captioned case, including the opinion, order and judgment of this court.

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